Supreme Court, U.S.
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No. 88-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CORPORATION,
Petitioner,

v.

UNITED STATES INTERNATIONAL
TRADE COMMISSION,
Respondent,

and

HITACHI METALS, LTD., ET AL.,
VACUUMSCHMELZE GmbH,
NIPPON STEEL CORPORATION, ET AL.,
and SIEMENS CAPITAL CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER ALLIED CORPORATION

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December 30, 1988

STATEMENT PURSUANT TO RULE 28.1

Since Allied Corporation filed its October 31, 1988 petition for certiorari, Allied-Signal Inc. has obtained an interest in two subsidiaries:

Lucky-Allied Plastics

JSR Allied Corporation

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I. INTRODUCTION

Relying on a selective view of the proceedings below, respondents argue (and the CAFC found) that Allied in 1984 abandoned any opportunity to obtain judicial review of the ITC's construction of Allied's patent claims. Respondents further contend (and the CAFC found) that Allied not only failed to petition from, but affirmatively defended and endorsed, the ALJ's 1984 claim construction. Both are wrong. Allied has been deprived of its day in court without warrant.

II. ARGUMENT

Allied appealed to the CAFC from the ITC's 1987 determination and modified exclusion order—not from the 1984 determination or general exclusion order. Relevant portions of the 1984 and 1987 orders are reproduced at the end of this brief. The orders themselves manifest substantial differences as to claim limitations—the generality of paragraph 1 of the broad 1984 order (*infra*, page 6) standing in sharp contrast to the specificity of paragraph 1 of the narrowed 1987 order (*infra*, pages 7-8).

Allied prevailed under the broad 1984 order and could not appeal (as the CAFC has held[1]). Allied lost under the narrowed and limited 1987 order and did appeal. It is that 1987 appeal that the CAFC dismissed on the ground of abandonment by Allied in 1984 of Allied's objection to claim limitations which did not appear in an ITC exclusion order until 1987.

The ITC's 1987 and 1984 claim constructions simply were not the same. The CAFC's appellate finding of fact that they were the same (and its characterization of Allied's argument to the contrary as "disingenuous") is supported by no evidence at all, to say nothing of substantial evidence.

It is striking that, before the 1985 evidentiary hearing, the ALJ revealed her own continuing uncertainty as to what she had determined in 1984 (CC452A):

> " 'Wide' is one of those 'long as a string' words, isn't it, so without being razor-sharp they might have a certain number of millimeters that I decide is narrow enough not to be under the patent, or the Commission might decide that, or the CAFC might decide that."

Subsequently, in March 1986, the ALJ resolved her doubt and ruled that to find "literal infringement" of the Allied

[1] Even if Allied had petitioned to the ITC in 1984, as now required by the CAFC, Allied could not have appealed to the CAFC from the 1984 final determination or 1984 exclusion order.

patent, *three* structural limitations[2] had to be found in the nozzle of the accused process (A-38-39). But the ALJ's resolution was not the ITC's resolution. In clear contrast, in May 1987, the ITC ruled differently (A-35), requiring that only *two* structural limitations[3] had to be found in accused nozzles for respondents' processes "to literally infringe". Thus, in 1987, in "further" construing "wide nozzle lips" to be of specific dimensions (A-35), the ITC materially altered the ALJ's prior claim construction. This fact is reflected in the 1987 modified exclusion order. To state and to stand by this fact is not to be disingenuous.

But even if the ITC's 1987 and 1984 claim constructions were the same, Allied did not abandon its right to appellate review by the CAFC of that claim construction. Allied never endorsed, affirmatively or implicitly, the construction ultimately espoused by the ITC in 1987. Indeed, Allied expressly rejected in 1984 the notion that specific apparatus limits had been added to the claims.

In 1984, the corporate respondents petitioned from the ID to the ITC on the ground that structural "dimensions" had erroneously been added to Allied's process claims (CC10111, CC10113). In 1984, Allied opposed respondents' view, arguing that the ALJ had *not added any* structural limitation to the process claims. This is plain from Allied's 1984 response to respondents' joint petition (CC10128A), e.g.:

> "The ALJ Did Not Add Any Limitation to the '257 Process Claims, But Simply Properly Interpreted the Claims in Light of the Patent Specification."[4]

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[2] Viz. (1) back lip dimensions, (2) front lip dimensions, and (3) slot width dimensions.

[3] Viz. (1) back lip dimensions and (2) front lip dimensions, but *not* (3) slot width dimensions.

[4] Allied did agree in 1984 that the ALJ had construed the process claims to include "wide lips". But Allied never agreed that the specific "dimensions" added by the ITC in 1987 (or any other dimensions) had been added in 1984. Prior to receiving respondents' joint petition in 1984, Allied did not perceive an issue on this specific score. Thus, Allied had no reason to mention the issue in its own 1984 petition to the ITC. Contrary to the ITC's suggestion (ITC Br. 10, n 8), Allied did not attempt to raise this issue in Allied's response;

Thus, issue was expressly joined before the ITC in 1984 as to the claim construction question Allied attempted to take to the CAFC in 1987, viz. the propriety of adding specific structural limitations (i.e., dimensions) to Allied's process claims. The ITC had full opportunity to consider that issue thoroughly in 1984. The only relevant question here is whether Allied should have been precluded by the CAFC from addressing the issue of claim construction on appeal in 1987, because a party other than Allied had in 1984 first perceived and raised the issue before the full Commission. Only by unjustifiably transforming Allied's express objections into disabling endorsements was the CAFC able to find such preclusion.

The record below demonstrates that Allied neither abandoned its objection to, nor embraced, the addition of structural dimensions to Allied's process patent claims. That record led the CAFC to its strained interpretation of the ITC regulations concerning exhaustion of administrative remedies—an interpretation that the ITC itself did not articulate in these proceedings prior to its response to the petition for certiorari.[5] That CAFC interpretation is inequitable, irrational and inconsistent with other appellate decisions recognizing the "narrow" scope of the administrative exhaustion doctrine. It is the inevitable consequence of an inapt solution looking for a rationale.

The CAFC's refusal to review the merits of the claim construction issue is especially irrational because that issue was contested in the parties' 1984 submissions to the full Commission.– The CAFC's error is compounded by its enlargement of the doctrine of administrative exhaustion. Other federal Courts of Appeals have refused to deprive a litigant of its right to judicial review of an issue merely because the litigant itself had

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Allied merely responded after respondents raised the issue in their petition.

Moreover, notwithstanding Hitachi's contentions to the contrary (Hit. Br. 3, 4, 11), Allied consistently and expressly urged before the ITC in 1984 that the ALJ erred in finding the Allied patent claims (1) invalid when read "literally" and (2) valid only when construed to include "wide lips" (CC10130).

[5] The ITC did not even mention 19 C.F.R. § 210.54(a)(2), the regulatory provision on which the CAFC's "abandonment" finding relies, in its own 1987 ruling.

not formally raised the issue at the agency level. These decisions reflect a proper understanding of the "narrow" scope of the doctrine of exhaustion of administrative remedies. E.g., *Safir* v. *Kreps*, 551 F.2d 447, 452-53 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 820 (1977). In unwarranted contrast, the CAFC has construed that doctrine expansively, in a manner not compelled by the text or the intent of the ITC regulations and not permitted by the Due Process Clause, so as to prevent Allied from being heard "at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).

III. CONCLUSION

For the reasons set out here and in Allied's petition, including the facts recited and the authorities cited, certiorari should be granted to reverse a CAFC decision that has deprived Allied of judicial review in a manner wholly inconsistent with applicable judicial authorities and fundamental precepts of due process.

Respectfully submitted,

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December 30, 1988

1984 Exclusion Order

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES

Investigation No. 337-TA-143

COMMISSION ACTION AND ORDER

* * *

Page 3

Order

Accordingly it is hereby ORDERED that—

1. Amorphous metal articles manufactured abroad in accordance with the process set forth in claims 1, 2, 3, 5, 8, and/or 12 of U.S. Letters Patent 4,221,257 are excluded from entry into the United States for the remaining term of said patent except (1) as provided in paragraphs 2 and 3 of this order, or (2) as licensed by the patent owner;

* * *

By order of the Commission.

KENNETH R. MASON

Kenneth R. Mason
Secretary

Issued: October 15, 1984

1987 Modified Exclusion Order

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN AMORPHOUS METAL ALLOYS AND AMORPHOUS METAL ARTICLES

Investigation No. 337-TA-143

COMMISSION ACTION AND ORDER

* * *

Pages 3-4

Order

Accordingly, it is hereby ORDERED THAT:

1. Amorphous metal articles which are manufactured abroad by a method of forming a continuous strip of amorphous metal from a molten alloy capable of forming an amorphous structure in accordance with the proceses set forth in claims 1, 2, 3, 5, 8, or 12 of U.S. Letters Patent 4,221,257, comprising:

a. forcing the molten alloy under pressure through a slotted nozzle positioned generally perpendicular to the direction of movement of a chill surface and located in close proximity to the chill surface to provide a gap of from about 0.03 to about 1 millimeter between said nozzle and the chill surface;

b. advancing the chill surface at a predetermined speed; and

c. quenching the molten metal in contact with the chill surface at a rapid rate to effect solidification into a continuous amorphous metal strip;

are excluded from entry into the United States for the remaining term of said patent except:

(a) as provided in this Order, or

(b) as licensed by the patent owner.

1987 Modified Exclusion Order

The phrase "slotted nozzle" found in claims 1 and 12 of the patent is construed to mean a nozzle having a rectangular or slotted opening and wide lips on the surface of the nozzle next to this rectangular or slotted opening. Wide lips are such that the width of the back nozzle lip (lip 1, measured in the direction of movement of the chill surface) must have a width that is at least equal to the width of the nozzle slot. The width of the front nozzle lip (lip 2, measured in the direction of movement of the chill surface) must be from "about 1.5" to "about 3" times the width of the nozzle slot. The phrase "about 1.5" is construed to mean that the front lip is from at least 1.45 to 1.55 times the width of the nozzle slot. The phrase "about 3" is not construed by this Order.

* * *

By order of the Commission

KENNETH R. MASON

Kenneth R. Mason
Secretary

Issued: June 17, 1987